SOME ASPECTS OF THE LAW RELATING TO FOREIGN EXCHANGE

Transactions in foreign exchange take on various forms. Strictly speaking purchases and sales of foreign currency—either metal or paper—do not come within the definition of foreign exchange, but on account of the identity of the ultimate subject matter some of the incidents of such transactions should be considered in connection with those properly coming within the designated field. Of these latter, there are several common forms: (1) the cable or wireless transfer, (2) the draft or check, (3) the delegation or money order, and (4) a form developed during the war—the deposit account or contract.

I. Foreign Currency

Ordinarily foreign currency is considered a commodity.[1] Transactions in it are, therefore, subject to the Statute of Frauds.[2] In a recent case[3] the question arose whether the owner of foreign currency which had been stolen from him could recover the same from an innocent purchaser. The Court held that the foreign money was being bought and sold by the parties not *qua* commodity but *qua* money and that therefore title passed under the Negotiable Instruments Law and the plaintiff could not recover. While this decision may rest upon a somewhat unreal distinction there can be no doubt that it satisfies the practical necessities of the situation. As the Court well said, business in foreign currency would be very seriously curtailed if the title of the purchaser were subject to attack.

II. Transfers of Credit

The great bulk of transactions in foreign moneys consist, however, of the transfer of credit balances in some one of the forms above mentioned. A banker in New York will have large credits with various banks or bankers in London, Paris, Berlin, Vienna and other foreign centers against which he sells exchange.

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[1]Reisfeld *v.* Jacobs (1919) 107 Misc. 1, 176 N. Y. Supp. 223; Equitable Trust Co. *v.* Keene (1920) 111 Misc. 544; but see Brown *v.* Perera (1918) 176 N. Y. Supp. 215, *aff'd* without opinion (1920) 182 App. Div. 922 and (1920) 229 N. Y. ——.

[2]Reisfeld *v.* Jacobs, *supra,* footnote 1; Equitable Trust Co. *v.* Keene *supra,* footnote 1.

[3]Brown *v.* Perera, *supra,* footnote 1.

(1) *The Cable or Wireless Transfer*

The most important transactions are carried on by cable or wireless. In form this is a sale of a cable transfer of a given quantity of foreign money at a specified rate for the equivalent in American funds plus the cable charge, both usually paid in advance. In other words, the seller notifies his foreign correspondent by cable or wireless to place the money sold to the credit of the purchaser. No two institutions use precisely the same memorandum of sale. In general, such memorandums provide that the seller shall not be responsible for errors in the transmission of the cable and that in case of delay the message may be confirmed by mail. It has been held that the legal effect of such a transaction is a warranty by the seller that he has a balance sufficient to cover the transfer and an undertaking to deliver the cable message for transmission.[4]

Accordingly, where the transfer of the credit was not effected for about a month after the cable message had been delivered, the purchaser was not permitted to recover from the seller damages resulting from a decline in the value of the foreign money.[5] This is obviously sound. If the transaction be looked at as an ordinary sale the only remedy of the purchaser is to reject delivery if it is not made within the time fixed by the contract. It has never been held that he might accept delivery and sue for the difference in value. Tested by the obligations of the peculiar contract the same result is reached. The cable was promptly delivered for transmission and the warranty of sufficient credit was satisfied.

On the other hand if the cable message is never delivered, a very different question arises. It is clear that the purchaser has not obtained what he paid for. It is, however, not so clear that there has been such breach of contract on the part of the seller as warrants the return of the money paid. In the absence of controlling language in the memorandum of sale it is difficult to say who has assumed the risk of non-delivery. If the seller has in legal effect assumed no absolute obligation to deliver the transfer at its destination, but has only undertaken to deliver the message for transmission, it would seem clear that he has not broken his contract or been unjustly enriched because of the failure of the message to reach its destination. But even if the contrary be

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[4] Strohmeyer & Arpe Co. *v.* Guaranty Trust Co. (1916) 172 App. Div. 16, 157 N. Y. Supp. 955; see also Oshinsky *v.* Taylor (1918) 172 N. Y. Supp. 231.

[5] Strohmeyer & Arpe Co. *v.* Guaranty Trust Co., *supra*, footnote 4.

assumed, and the seller be deemed charged with the obligation to deliver, how can it be said that there was such a failure of consideration as to entitle the purchaser to rescind? It is clear that he is entitled to the return of money paid for the cable charges, but it is submitted that the sale of the money itself should not be disturbed. It was the intention of the purchaser to acquire title to the foreign money and he should not be permitted to rescind when the value of the money has fallen, as it is obvious that there would be no attempt to rescind had the value of the foreign money increased.

There is, indeed, a very serious question whether any right of rescission arises under these circumstances as there is at most a technical breach of the contract not coupled with anything indicating a repudiation. This distinction has been recognized by some of the text writers and in some of the authorities.[6] In New York there are no controlling authorities on the subject, but the better considered *dicta* limit the right of rescission to cases where the breach amounts to an abandonment or repudiation of the whole contract.[7] Where the breach does not amount to a repudiation, the only remedy is for damages. Now, it is clear that the inability of the telegraph company to deliver the cable message cannot be deemed an abandonment or repudiation of the contract on the part of the seller, especially as he continues ready to deliver the foreign money to the purchaser in any other manner.

Moreover, the relationship between the parties so far as the delivery of the moneys is concerned is really that of principal and agent.[8] In other words, the transaction should really be resolved into two parts: a sale of foreign moneys and an agreement to make the same available by giving certain directions by cable. As to the first, the parties are both principals; as to the second, the so-called seller is really an agent and therefore liable only for misconduct. Viewed from any point of view, there should, therefore, be no right to recover the original money paid. If any liability exists, it is for damages for negligence.

There are no determining authorities on this subject. In one case in New York, the Appellate Term of the Supreme Court said

[6]See Burdick, Sales (3rd ed. 1913) 168; Pollock, Contracts (3rd Amer. ed. from 7th Eng. ed. 1906) 340 and note; Keener, Quasi-Contracts (1893) 299.

[7]See Graves *v.* White (1882) 87 N. Y. 463, 465, citing Dubois *v.* Delaware & Hudson Canal Co. (N. Y. 1830) 4 Wend. 290. See also Hubbell *v.* Pacific Mut. Ins. Co. (1885) 100 N. Y. 41, 2 N. E. 470.

[8]See Fliker *v.* State Bank (1916) 94 Misc. 609, 159 N. Y. Supp. 730.

that the obligation of the seller in case of failure to deliver was merely to hold the foreign money for the purchaser and to transfer the same to him upon demand and that the purchaser's measure of damages would be the value of the foreign money within a reasonable time after demand by him.[9] The Court held, however, that the burden of explaining the failure to deliver was on the defendant and therefore allowed the plaintiff to recover the amount originally paid. No attempt was made by the defendant in that case to show what was a reasonable time for the delivery of the foreign moneys or what was the value of the same at any time except one year after the purchase, so that it was not possible for the Court to apply the general rule stated by it.

In a very recent case in the Municipal Court of New York,[10] the plaintiff was allowed only the value of the foreign money at the time of trial where it appeared that the defendant had cabled to its foreign correspondent, that the latter had written to the payee that she should call for the money, that the lettter was not returned by the post office although never received by the payee and that the money was never paid over. The case throws no light on the general question because the cable message reached and a credit in favor of the payee was actually created and also because the agreement between the parties relieved the defendant from any responsibility for the acts of correspondents or other agencies.

On the other hand, the Appellate Division of the Supreme Court has stated that the purchaser could recover the money paid.[11] In that case a wireless transfer on Germany was purchased a few days prior to our entry into the war and never delivered owing to the suspension of wireless communication. The defendants claimed a special agreement as to the disposition of the marks in case of non-delivery of the wireless transfer and obtained a verdict from the jury. For error in the exclusion of evidence offered by the plaintiff to rebut this agreement, the Court reversed the judgment and ordered a new trial. It is, therefore, apparent that what was said as to the plaintiff's right to recover the money paid was by way of *dictum*. Moreover, the Court ignored the construction it had previously placed on wireless transfers in the *Strohmeyer* Case.[12]

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[9] Oshinsky *v.* Taylor, *supra,* footnote 4.

[10] Sommer *v.* Taylor (1920) 1st Dist. Mun. Ct. N. Y., per Crane, *J.* # 8966/1920.

[11] Atlantic Communication Co. *v.* Zimmermann (1918) 182 App. Div. 862, 170 N. Y. Supp. 275.

[12] Strohmeyer & Arpe Co. *v.* Guaranty Trust Co., *supra,* footnote 4.

In any event, the purchaser must wait a reasonable time before he can rescind. As there is usually no time specified for delivery, the law implies a reasonable time which depends upon all the circumstances.[13]

In an action for negligence the proper measure of damages should be the value of the foreign money at the time delivery should have been made.[14]

(2) *The Draft or Check*

No such question can arise in connection with transfers by check or draft. The seller simply draws his check or draft on his correspondent in the appropriate foreign center for the amount of foreign money purchased and delivers it—usually in duplicate—to the purchaser. The transmission of the check or draft devolves entirely upon the purchaser. Consequently he assumes the entire risk in case of the check's failure to reach its destination.

In a recent case, the question arose as to the purchaser's measure of damages upon redelivery of a draft to the sellers and its cancellation. The trial Court based its judgment upon the market value at the time the action was commenced. This was held to be error as the purchaser was entitled to the value of the foreign money at the time the transfer of credit was made back to the seller.[15]

(3) *The Delegation or Money Order*

Transfers by delegation or money order, while the same in effect as transfers by check, are slightly different in form. Instead of delivering a check to the purchaser the seller notifies his correspondent by mail to make a transfer to a designated person. This is substantially the same as a cable transfer except that the mails are used. On the other hand the transaction is also the same as though a check had been issued endorsed to the person to whom

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[13]Oshinsky *v.* Taylor, *supra,* footnote 4.

[14]See Gross *v.* Mendel (1916) 171 App. Div. 237, 157 N. Y. Supp. 357, *aff'd* without opinion (1919) 225 N. Y. 633. In that case, a draft payable in Germany in marks was refused on account of the war. In the suit brought in New York, the plaintiff was awarded damages based on the value of the marks at the time payment should have been made, as against the defendant's contention that only the value of the marks at the time of the trial should be recovered.

See the contrary result recently reached in England in Kirsch & Co. *v.* Allen, Harding & Co. (1919) 36 T. L. R. 59, 122 L. T. 159, (1919) Weekly Notes 301. In that case, damages were awarded based on the value at the time judgment was rendered.

[15]Gelfand *v.* State Bank (1918) 172 N. Y. Supp. 99.

payment should be made and then redelivered by the purchaser to the seller for transmission. In other words, the seller accommodates the purchaser by arranging for the payment abroad.

There is usually no undertaking on the part of the seller to make the remittance to the person designated. The ordinary memorandum used describes a sale of the foreign money and an undertaking merely to instruct the seller's correspondent to make delivery. It is submitted that there is here no basis for allowing the customer to rescind. The time element which seemed to carry so much weight in the *Atlantic Communication Co.* Case is entirely lacking. Moreover, there is every reason for looking at the transaction as complete with the mailing of the instructions by the seller. It has accordingly been held that no liability can be imposed upon the seller for the failure of his instructions to reach his correspondent or for the failure of the correspondent to effect payment and the seller is liable only for the value of the foreign money at the time of purchaser's demand for repayment.[16]

(4) *The Deposit Account or Contract*

The last form—deposit or contract—is the transaction which the defendants in the *Atlantic Communication Co.* Case claimed was agreed upon in the event that the wireless failed to arrive. It consists of the creation by the seller of an account on his books in foreign money to the credit of the purchaser, subject to withdrawal by the purchaser either on demand or on some specified prior notice. Interest is credited in the foreign money, usually at the same rate as is allowed the seller by his foreign correspondent. The rate of interest is always higher when the moneys can be withdrawn only upon giving prior notice. The moneys can be withdrawn in any one of the other forms—by cable transfer, check or delegation but not in currency. The money can also be resold to the original seller.

This form was developed in order to facilitate investment in foreign moneys. The low rates, arising from the war, especially for marks and kronen, tempted many persons to invest in the hope of making a speculative profit later. Because of uncertain conditions abroad they were unwilling to have their money carried in some foreign bank. Therefore, this method was devised making it possible to purchase foreign moneys and have them held here. Of course the banker charges an extra rate for this privilege as he

[16]Fliker *v.* State Bank, *supra,* footnote 8.

runs the risk of the insolvency of his foreign correspondent during the time that these contracts are outstanding.

This form separates the two essential features of all exchange transactions—the sale of the foreign money and the transfer to the foreign country. Therefore, it is not likely to lead to litigation. There is an unreported case[17] in which the purchaser claimed that he was entitled to the foreign money in currency and sued to rescind because that was not given him. The Court held, however, that the agreement related to exchange and not to currency and therefore gave judgment for the defendants.

III. Private Bankers

As a considerable business in foreign exchange is conducted by small bankers, steamship agencies and other mediums often having no direct foreign correspondents, regulatory legislation has been found necessary to protect the public. In New York, such mediums are classified as private bankers[18] and are required to file reports and deposit security with the Banking Department.[19]

The burden of proving the proper transmission of the money is imposed on the private banker. It may, however, be shifted by the presentation of an affidavit from the foreign correspondent that the payment was made or of an affidavit that the money was transmitted to the banker's correspondent with a receipt from the payee,[20] thus obviating the necessity of issuing a commission.

These statutory provisions have received but little construction. Quite obviously it was held that a Trust Company was not subject to the statutory burden of proof as not within the definition of private banker.[21] It was also held improper to award judgment against a private banker where he was unable to meet the burden of proof because communications had been interrupted with the country to which the money was to be transmitted.[22]

[17] Goldberg *v.* Zimmermann (1919) 7th Dist. Mun. Ct. N. Y., per Genung, *J.* # 2427/1919.

[18] Banking Law, § 2.

[19] Banking Law, §§ 150-172.

[20] Banking Law, § 167.

[21] Herzog *v.* Transatlantic Trust Co. (1918) 172 N. Y. Supp. 394.

[22] Rosenblatt *v.* Josephsohn (1918) 172 N. Y. Supp. 719.

IV. Conclusion

While the authorities in the field are very meagre the fundamental legal principles applicable seem to be clear and well settled except where there has been a failure to deliver a cable transfer. Whether in such case the purchaser should be entitled to recover the money paid, or the value of the foreign money at the time the purchaser demands payment back, has not been definitely decided, but it is submitted that the last rule is the proper one.

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